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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
TELEPHONE COMPANY- CABLE TELEVISION Cross-Ownership Rules, Sections 63.54-63.58	)	CC Docket No. 87-266
	)	
and	)	
	)	
Amendments of Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service (Fourth Further Notice of Proposed Rulemaking)	)	RM-8221

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COMMENTS OF VIACOM INC.

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SUMMARY

The Commission has envisioned from the outset of its video dialtone ("VDT") rulemaking that a broadened role for local exchange carriers ("LECs") in the provision of video programming would serve three major public interest goals: encouraging development of an advanced telecommunications infrastructure, fostering additional competition among multichannel video providers, and promoting a diversity of voices in the marketplace. Only three years ago, the FCC further concluded that -- even if LECs were freed of the cross-ownership restriction and allowed to compete as direct providers of video programming in-region -- the FCC's common carrier VDT framework would be the best mechanism for achieving these public interest goals.

Nothing in the recent court rulings that invalidated Section 533(b) requires, or even suggests, that the Commission reconsider these fundamental conclusions. Viacom submits that abandonment of the VDT regulatory framework would place the Commission's long-standing goals at risk. Because video dialtone is well suited to meeting policymakers' interests in fostering competition (both intermodal and intramodal) among multichannel video providers and in promoting development of the nation's telecommunications infrastructure, the FCC's task now is simply to refine existing safeguards and craft certain

additional safeguards to effectively tailor its common carrier VDT framework. However, the VDT framework need not, and should not, be encumbered by excessive or unwarranted regulation that would impede video dialtone from emerging as a viable, competitive multichannel distribution technology.

So that LEC participation in the delivery of video programming promotes both competition to cable and competition over the VDT platform, the Commission should work within its existing VDT framework to achieve the following:

- ensure that set-top boxes (or functionally equivalent elements of VDT networks) cannot be used to thwart the open, nondiscriminatory access required for rival packagers and programmers to reach, and fairly compete for, subscribers on each VDT system;
- limit the ability of a LEC to allocate an undue portion of limited VDT channel capacity to an affiliated packager;
- ensure that unaffiliated programmers and packagers are presented and positioned on-screen in a manner that does not unfairly handicap their ability to compete for subscriber viewing; and
- craft "channel sharing" rules that do not allow a LEC to impede packager competition or interfere with an unaffiliated programmer's right to control the licensing of its program service.

The Commission should encourage the development of VDT by imposing on such systems only certain specifically tailored additional safeguards. In particular, the FCC should:

- modify its joint marketing rules to require a LEC engaging in "inbound telemarketing" to affirmatively and fairly disclose the availability of unaffiliated packagers to potential VDT subscribers;

- modify its customer proprietary network information ("CPNI") rules to ensure that all programmers and packagers have the same access to such potentially valuable CPNI as that (if any) provided to LEC affiliates; and

- refrain from grafting onto the VDT framework ill-suited cable regulations such as the program access rules -- application of which would turn those rules on their head by serving to hamper VDT development as an alternative multichannel video distributor.

Viacom thus urges the Commission to tailor its safeguards for the next stage of video dialtone in a manner that addresses the increased potential for favoritism inherent in the dual LEC role of VDT operator and VDT packager or programmer -- while nonetheless allowing VDT to flourish as an alternative provider of multichannel video programming.

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COMMENTS OF VIACOM INC.

Viacom Inc. ("Viacom") hereby submits its comments on the Fourth Further Notice of Proposed Rulemaking ("Fourth Further Notice") in the above-captioned "video dialtone" ("VDT") proceeding.[1] The Fourth Further Notice tackles vital issues of potential long-term consequence with respect to the direct provision of video programming by local exchange carriers ("LECs") in their telephone service areas. At this critical juncture in the development of the nation's telecommunications infrastructure, Viacom urges the Commission to adhere to its fundamental reliance on the

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[1] Telephone Company - Cable Television Cross-Ownership Rules, CC Docket No. 87-266, FCC 95-20 (released Jan. 20, 1995) (hereinafter "Fourth Further Notice").

common carrier framework of video dialtone for establishing the terms of LEC entry.

For a programmer such as Viacom, VDT holds the potential to become a significant new avenue for distribution of its program offerings to consumers.[2] And as a potential packager, Viacom strongly endorses the development of VDT as an open platform for competitive packagers of video programming. Viacom has thus firmly supported the FCC's ongoing efforts in this proceeding to foster development of

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[2] Viacom, a diversified entertainment and communications company, has various interests that would be directly affected by the parameters established by the Commission in this and related proceedings to govern the operation of VDT systems. Viacom's MTV Networks division ("MTVN") owns the advertiser-supported program services MTV: Music Television, VH1, and Nickelodeon (comprised of the Nickelodeon and Nick at Nite programming blocks). Viacom's wholly-owned subsidiary Showtime Networks Inc. ("SNI") owns the premium program services Showtime, The Movie Channel, and FLIX, and Viacom's wholly-owned subsidiary MTV Latino Inc. owns the advertiser-supported program service MTV Latino, which is distributed domestically and to Latin American territories. In addition, Viacom (through its wholly-owned subsidiaries, or through affiliated entities) holds partnership interests in several other advertiser-supported program services including Comedy Central, USA Network, Sci-Fi Channel, and All News Channel. Viacom also owns Showtime Satellite Networks Inc., which licenses SNI, MTVN, and a variety of third-party program services to owners of home television receive-only earth stations nationwide. Further, Viacom is engaged in a number of other businesses including the ownership of cable systems; television and radio broadcasting; the production and licensing of syndicated and network television programming and interactive media; the production, distribution, and exhibition of theatrical motion pictures; the retail distribution of music and video cassettes; the ownership and operation of amusement parks and arenas for live entertainment; the publication and distribution of education, business, and trade books; and the licensing and merchandising of its trademarks.

competition both among rival transmission systems (i.e., "intermodal" competition) and among rival packagers and programmers on a single VDT platform (i.e., "intramodal" competition).[3]

Policymakers, too, have made clear their intent to foster greater competition among multichannel video distributors and to encourage the development of sophisticated communications networks nationwide.[4] Because the Commission's video dialtone regulatory scheme is best suited to meeting these goals, the VDT framework should be reaffirmed and adapted to accommodate the entry of LECs into the direct provision of programming in their service areas. However, this broadened LEC role -- as not just the operator of the VDT platform, but also as one of the packagers or programmers on the platform -- will increase the incentives and opportunities for potential anticompetitive conduct.

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[3] See Comments of Viacom International Inc. (filed Dec. 16, 1994) (hereinafter "Viacom Comments"); Reply Comments of Viacom International Inc. (filed Jan. 17, 1995) (hereinafter "Viacom Reply"); Opposition of Viacom International Inc. to Petitions for Reconsideration of Ameritech Operating Companies and Liberty Cable Company (filed Feb. 9, 1995) (hereinafter "Viacom Opposition") [all filed in Docket No. 87-266].

[4] See, e.g., National Telecommunications and Information Administration, The National Information Infrastructure: Agenda for Action, 58 Fed. Reg. 49025 (Sept. 15, 1993); see also Telecommunications Competition and Deregulation Act of 1995 [Discussion Draft], released Jan. 31, 1995 ("Pressler Draft"); Universal Service Telecommunications Act of 1995 [Staff Working Draft], released Feb. 14, 1995 ("Hollings Draft").

Thus, to ensure that video dialtone remains a truly nondiscriminatory, openly accessible distribution system, the FCC must refine some of its existing VDT rules and specifically tailor certain additional safeguards. The Commission should nevertheless refrain from unduly burdening video dialtone with unnecessary restrictions that could impede VDT systems from developing as vigorous rivals to other multichannel programming distributors.

I. A TITLE II-BASED VIDEO DIALTONE FRAMEWORK FOR LEC ENTRY INTO THE DIRECT PROVISION OF VIDEO PROGRAMMING WOULD BEST SERVE THE FCC'S PUBLIC INTEREST GOALS AND FULLY COMPORT WITH THE FIRST AMENDMENT

The Commission has asked whether it should depart from the common carrier framework of video dialtone to regulate LEC entry into the direct provision of video programming in-region.[5] Without a doubt, the LECs' competitive position in multichannel video distribution is substantially altered by virtue of their emerging dual role as operator of a video platform and as packagers using that same platform to reach subscribers. As a matter of policy, Viacom believes that this development provides the FCC with greater, not lesser, reasons to maintain its Title II-based scheme for regulating LEC provision of video programming. As a matter of law,

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[5] Fourth Further Notice at ¶¶ 10-13.

nothing in the First Amendment or in the cases prompting the Fourth Further Notice compels a different result.[6]

From the earliest phases of this rulemaking proceeding, the Commission envisioned that VDT would -- irrespective of the telco/cable cross-ownership ban -- serve three broad public interest goals:

(1) increased investment opportunities for the development of an advanced telecommunications infrastructure;

(2) the fostering of additional competition in the provision of video and communications services; and

(3) the fostering of a diversity of programming in order to create additional opportunities for consumer choice.[7]

The FCC has previously found that VDT's common carrier framework would be the best mechanism for achieving these goals in the event that LECs were freed to compete as in-

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[6] See Chesapeake & Potomac Tel. Co. of Virginia v. United States, 42 F.3d 181, 202 (4th Cir. 1994); U S WEST, Inc. v. United States, No. 94-35775, D.C. No. CV-93-01523-BJR (9th Cir. 1994) (collectively, the "appellate court decisions").

[7] Telephone Company - Cable Television Cross-Ownership Rules, 7 FCC Rcd. 5781, 5787 (1992); see also Telephone Company - Cable Television Cross-Ownership Rules, 7 FCC Rcd. 300, 304 (1991) (hereinafter "Second Report and Order") (VDT would "provide the best foundation to achieve our goals of promoting the development of an efficient, nationwide, publicly accessible, advanced telecommunications infrastructure; facilitating robust competition; and fostering the First Amendment goal of ensuring a diversity of information sources"); Telephone Company - Cable Television Cross-Ownership Rules, 10 FCC Rcd. 244, 248 (1994) (hereinafter "Memorandum Opinion & Order on Recon.").

region providers of video programming.[8] When recommending in 1992 that Congress repeal Section 533(b), the Commission determined that LEC entry as one of several rival VDT packagers or programmers would "further promote our overarching goals in this proceeding by increasing competition in the video marketplace, spurring the investment necessary to deploy an advanced infrastructure, and increasing the diversity of services made available to the public."[9] The FCC thus concluded three years ago that LEC entry as a VDT packager or programmer would warrant not the abandonment of this Title II-based approach, but rather the continued application of its VDT framework plus further safeguards.[10]

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[8] [I]n order to best fulfill the goals of the Communications Act and ensure that the public interest is served, we additionally conclude that at this time we would . . . require that in order for a local telephone company to have an ownership or controlling financial interest in video programming, the telephone company's programming service must be offered through the basic [VDT] platform that provides service to multiple programmers. . . . [W]e believe that, at present, such a requirement will greatly serve the public interest by furthering basic public policy goals of the Communications Act.

Second Report and Order, 7 FCC Rcd. at 5850.

[9] Id. at 5847.

[10] See id. at 5847-48 (further safeguards to include limiting "the extent of local telephone company-provided

(continued...)

Any contrary regulatory approach to the broadening of the LEC role in video programming and packaging would indeed place the Commission's long-standing policy goals at risk. Only the VDT framework could ensure a nondiscriminatory platform offering consumers and programmers the benefits of not just competition to cable, but also intramodal competition among rival packagers sharing the VDT platform. The VDT approach, if appropriately tailored, should thus be singularly effective in promoting the availability of the widest possible video programming choices to the public at the best possible prices. Furthermore, no other regulatory scheme both promotes the integrated broadband infrastructure and provides the open access necessary to bring to fruition the full benefits of the "information superhighway" long sought by policymakers not only in the Commission but also in the Executive Branch and Congress.[11]

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[10](...continued) programming . . . to a specified percentage of overall capacity"); see also id. at 5850-51.

Consistent with its 1992 determination, the Commission's first forays into regulation of a LEC as an in-region video programming provider have relied upon the VDT common carrier framework, augmented with safeguards tailored to address the increased potential for improper favoritism of affiliated programmers or packagers. See Chesapeake and Potomac Tel. Co. of Va., File No. W-P-C 6834, at ¶¶ 21-22 (released Jan. 20, 1995) (market trial in northern Virginia) [hereinafter "Bell Atlantic Market Trial Order"]; BellSouth Telecommunications, Inc., File No. W-P-C 6977, at ¶¶ 20-23 (released Feb. 8, 1995) (market trial in various communities in Georgia).

[11] See supra note 4.

Certainly, none of the relevant court decisions requires, or even suggests, that the FCC reconsider its fundamental VDT approach.[12] The appellate courts simply struck down as overbroad the Section 533(b) ban on a LEC's provision of video programming "directly to subscribers in its telephone service area."[13] They did not reject the legitimacy of the government's interest in fostering multichannel video competition.[14] Indeed, each one of the reported decisions pointed to the Commission's VDT framework

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[12] See supra note 6. See also Chesapeake & Potomac Tel. Co. of Virginia v. United States, 830 F. Supp. 909, 930-31 (E.D. Va. 1993); BellSouth Corp. v. United States, 68 F. Supp. 1335, 1342 (N.D. Ala. 1994); Ameritech Corp. v. United States, 867 F. Supp. 721, 735 & n.9 (N.D. Ill. 1994); NYNEX Corp. v. United States, Civil No. 93-323-P-C (D. Me. Dec. 8, 1994) (adopting rationale of Fourth Circuit decision); cf. U.S. Dist. Court Says All Telcos Can Offer Video Programming, Common Carrier Week, Feb. 6, 1995 (reporting bench ruling for summary judgment in favor of USTA, et al., in challenge to § 533(b)).

[13] C&P Telephone Co. of Virginia v. United States, 42 F.3d at 203; U S WEST, No. 94-35775, at ___.

[14] C&P Telephone, 42 F.3d at 198-99; U S WEST, No. 94-35775, at ___. The Fourth Circuit noted that (1) the government's interest in "eliminating restraints on fair competition is always substantial, even where the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment"; (2) the government's interest in "assuring that the public has access to a multiplicity of information sources is a government purpose of the highest order, for it promotes values central to the First Amendment"; and (3) the government's interest in "ensuring that private interests not restrict, through physical control of the critical bottleneck of . . . communication, the free flow of information and ideas" is also of great significance. C&P Telephone, 42 F.3d at 198-99 (omitting internal citations to Turner Broadcasting Systems, Inc. v. United States, ___ U.S. ___, 114 S. Ct. 2445 (1994)).

as an example of an appropriate, "narrowly tailored" regulation that would address the government's interest while also affording proper accommodation of LECs' constitutional rights.[15]

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[15] C&P Telephone, 42 F.3d at 202; U S WEST, No. 94-35775, at ___. See also supra note 12. The VDT regulatory framework clearly would be deemed viewpoint- and content-neutral under recent Supreme Court analysis. Turner, ___ U.S. at ___, 114 S. Ct. at 2459-61. Moreover, as the Court recently held, certain incidental burdens on speech that distinguish between speakers "based only on the manner in which speakers transmit their messages, and not upon the messages they carry" may be "justified entirely by the peculiar economic and physical characteristics" of the medium. Turner, ___ U.S. at ___, 114 S. Ct. at 2460, 2468; e.g., C&P Telephone, 42 F.3d at 196. See also National Ass'n of Regulatory Utilities Commissioners v. FCC, 525 F.2d 630, 641 (D.C. Cir. 1976), cert. denied, 425 U.S. 992 (1976) (FCC imposition of common carrier obligation is constitutional). Thus, a Commission decision requiring that LECs offer video programming through VDT systems would not embody the type of regulatory distinctions to which the Supreme Court has applied "strict scrutiny," the highest level of First Amendment review. See C&P Telephone, 42 F.3d at 193-97 (citing Turner, ___ U.S. at ___, 114 S.Ct at 2460-67).

Rather, this common carrier framework would likely be subjected to only intermediate First Amendment scrutiny. A Commission mandate that LECs offer their own video programming via a common carrier platform would easily survive court review under the intermediate scrutiny standard because (1) the obligation would serve the judicially approved "significant" government interest of ensuring fair and widespread competition in the delivery of video programming, (2) the obligation would be "narrowly tailored" to meet the government interest in fostering competition among video programmers and packagers while preventing LECs from acting in an anticompetitive fashion in their role as VDT platform operators, and (3) the obligation would certainly "leave open ample alternative channels for communication" because the LEC would be free to speak through its own program package carried over the LEC's VDT platform. Cf. C&P Telephone, 42 F.3d at 202 & n.35.

Given that video dialtone is uniquely well-suited to meeting the FCC's competition, infrastructure and diversity goals, the Commission's task now is simply to refine and adapt the existing common carrier framework to new circumstances. As both the courts and the agency have already recognized,[16] a LEC's dual role as both VDT operator and VDT packager or programmer raises the potential for improper discrimination against unaffiliated packagers and programmers carried on the VDT platform. Consequently, as the next two sections detail, current VDT safeguards must be adapted, and specifically tailored new measures added, if LEC entry into the direct provision of video programming is to fulfill the competitive and public interest promise the Commission has long pursued.[17] The FCC should not, however, undertake a wholesale importation of unwarranted restrictions that would prevent VDT from thriving as an alternative means of multichannel video programming distribution.

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[16] See supra notes 6, 8-10, 12.

[17] The Commission asks whether the "trial" status of certain VDT operations warrants application of rules different from those governing permanent VDT commercial service. See Fourth Further Notice at ¶ 18. A LEC acting as both VDT operator and packager in a market trial faces opportunities for unfair favoritism like those available when the LEC offers permanent service. Because no showings have been made to justify applying different sets of rules in the two contexts, the standards for permanent VDT commercial service should apply equally to market trials. Moreover, the market trial setting appears to be a useful vehicle for the Commission to test the efficacy of its competitive safeguards.

II. EXISTING VIDEO DIALTONE SAFEGUARDS SHOULD BE FINE-TUNED TO ENSURE THAT THE NONDISCRIMINATORY PROMISE OF THE VDT PLATFORM IS NOT UNDERMINED BY THE LEC'S ABILITY TO CARRY ITS OWN PROGRAM PACKAGE OVER THAT PLATFORM

Viacom agrees with the Fourth Further Notice's apparent premise that for LEC entry as a VDT packager or programmer to serve the public interest, the LEC's concurrent operation of the VDT platform warrants further tailoring of the existing video dialtone framework.[18] The LEC's dual role of VDT platform operator and VDT packager or programmer could well limit VDT capacity available for, and create the potential for unfair discrimination against, unaffiliated programmers and packagers. Consistent with the VDT's common carrier framework, LECs in these new circumstances must remain subject to broad nondiscrimination and open access requirements that preclude them from imposing any technological or economic measures (including through the terms and conditions of carriage) that would limit access or disadvantage independent programmers or packagers.[19]

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18 Fourth Further Notice at ¶ 13.

19 One of the benefits of common carriage regulation is that Title II already provides for processes to resolve disputes over operator compliance with the Commission's VDT rules. See 47 U.S.C. §§ 207, 208 (granting FCC jurisdiction to investigate complaints of, and award damages to, any person injured by a common carrier's failure to comply with its Communications Act obligations). Given the nascent stage of both VDT development and VDT regulation, these existing measures should be augmented to allow for expedited

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As a preliminary matter, the FCC must identify the level of LEC interest in an affiliated packager that will trigger its modified VDT safeguards. This task calls upon the Commission to make a real-world assessment of the distinction between a limited or attenuated interest which nonetheless provides an important source of capital, on the one hand, and a level of equity or interrelationship that creates a significant risk of LEC anticompetitive conduct, on the other. The existing cable/telco attribution rules begin by defining "affiliate" as an entity that is directly or indirectly owned by, operated by, controlled by, or under common control with another entity.[20] The question, then, is how to define "ownership" and "control."

To date, the FCC has appropriately looked beyond mere business form in its effort to identify entities in which the LEC has a noteworthy ownership interest. In contrast to its broadcast attribution rules, for example, the Commission's VDT rules require scrutiny of the LEC's level of equity

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[19](...continued)
Commission consideration of complaints. Viacom believes it would be appropriate to require that VDT complaints be resolved within 180 days after notice of the dispute is submitted to the FCC. Any aggrieved party should be authorized to file a complaint with the Commission with respect to these matters.

[20] 47 C.F.R. § 63.54. This element of the "affiliate" definition has been incorporated through similar language in both telecommunications legislation drafts recently circulating on Capitol Hill. See Pressler Draft at 9; Hollings Draft at 7.

interest in an affiliate, regardless of whether such interest carries voting rights.[21] It is all the more appropriate that the VDT affiliation standard look to equity stakes of all forms once the video dialtone framework provides for LEC participation in VDT packaging and programming.

As for the specific level of LEC equity interest that should constitute affiliation, there appears to be a growing recognition among policymakers that real-world capital formation requirements warrant an increase in the existing 5% threshold. Congressional leaders on both sides of the aisle have indicated support for raising the cable/telco attribution threshold to 10%,[22] a level that would strengthen the ability of programmers and packagers to raise capital while still capturing any significant equity stake that could give rise to misconduct. The Commission itself has proposed similar modifications of its ownership attribution rules in other settings.[23] As policymakers on Capitol Hill and in the agency are coming to find, this adjustment would allow for

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[21] Compare 47 C.F.R. § 63.54(e)(1) (LEC affiliation established by ownership of "voting or non-voting stock") with 47 C.F.R. § 73.3555 Note 2 (broadcast stock interest cognizable only if voting).

[22] See Pressler Draft at 9; Hollings Draft at 7 (each defining ownership as an equity interest greater than 10%).

[23] See, e.g., Review of Commission's Regulations Governing Attribution of Broadcast Interests, MM Docket No. 94-150, FCC 94-324 (released Jan. 12, 1995) (proposing to raise attribution threshold from 5% to 10% for voting stock in licensee corporation).

needed investment in programming quantity and quality without compromising the concerns underlying the regulatory safeguards. Therefore, Viacom urges the FCC to allow LECs to hold up to a 10% equity interest in a programmer or packager before the LEC's ownership is deemed attributable.

As for indicia of control that should be deemed attributable even in the absence of a significant equity stake, this second prong of the affiliation definition warrants redefinition as well. De facto control of an entity should -- as the Commission has always recognized -- constitute affiliation regardless of the level of equity interest at issue. To that end, Viacom urges the FCC to define "control" more fully as controlling the vote of the board of directors of a corporation or otherwise controlling the actions of an entity's management.[24] This definition, together with a 10% equity standard for ownership attribution, would safeguard the operation of VDT systems as nondiscriminatory video platforms while also affording programmers and packagers the needed flexibility to attract further investment.

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[24] Cf. Hollings Draft at 8 ("control means the power, direct or indirect, whether or not exercised, and whether or not exercised or exercisable through the ownership of a majority or a dominant minority of the total outstanding voting securities of an issuer, or by proxy voting, contractual arrangement, or other means, to determine, direct, or decide matters affecting an entity").

After calibrating the appropriate attribution benchmark, the Commission should clarify how its existing VDT safeguards might best be tailored to address the prospect of LEC entry as a program packager. To help ensure that video dialtone systems truly fulfill their common carrier function of affording all VDT users -- whether LEC affiliates or not -- the basic platform service of transmission, interconnection, and interoperability on a nondiscriminatory basis, the FCC should first review and revise the following safeguards already existing in, or pending incorporation into, its initial VDT framework: (1) nondiscrimination rules that preclude use of the set-top box (or its functional equivalent) as a barrier to open access to subscribers for unaffiliated packagers, programmers, or other suppliers of competitive services utilizing the VDT system; (2) tailored standards for ensuring sufficient capacity to accommodate multiple packagers and programmers; (3) nondiscrimination safeguards encompassing the menu-positioning (or similar presentation to subscribers) of the offerings of unaffiliated packagers and programmers on the VDT platform; and (4) a channel-sharing policy that effectively addresses shortfalls of analog capacity, without interfering with programmer control over the licensing of its product.

A. Ensuring That The Set-Top Box Or Its Functional Equivalent Does Not Unfairly Restrict Unaffiliated Packagers' Or Programmers' Access To VDT Subscribers Becomes Even More Critical As LECs Assume The Dual Position Of VDT Operators And VDT Packagers

The video dialtone policy's promise of open access would mean little if it failed to afford unaffiliated programmers and packagers a genuine opportunity to reach subscribers with their program offerings. Thus, since its inception, the Commission's VDT framework has required not simply a nondiscriminatory platform available to multiple programmers and packagers, but also "a means by which end-user subscribers can access any and all of the video programming offered" over that basic platform.[25] LEC entry as a packager on the VDT platform only heightens the need for safeguards to prevent the creation of artificial barriers which would limit the access to subscribers afforded unaffiliated packagers or programmers.

In this regard, Viacom and others have already demonstrated that the issues surrounding the set-top box (or

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[25] In re Applications of Ameritech Operating Companies, File Nos. W-P-C 6926, W-P-C 6927, W-P-C 6928, W-P-C 6929, W-P-C 6930, FCC 94-340, ¶ 9, released Jan. 4, 1995 (hereinafter "Ameritech Applications"). The language in Ameritech Applications comes directly from the FCC's first major order in this proceeding. See Second Report and Order, 7 FCC Rcd. at 5783 n.3 ("A 'basic platform' is . . . transmission service coupled with the means by which consumers can access any or all video program providers making use of the platform.").

functionally equivalent network elements) warrant further FCC consideration. Chairman Hundt also recently identified the set-top box as one of the critical potential bottlenecks that could "stymie the growth" of new communications networks.[26] Viacom thus again urges the Commission to take whatever steps are necessary to ensure that the ability of all programmers and packagers to reach subscribers on a nondiscriminatory basis is not handicapped at any point throughout the entire distribution system, including, without limitation, any terminal equipment (such as set-top boxes) necessary for subscribers to connect to and receive programming from the platform.[27]

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[26] Speech of FCC Chairman Reed E. Hundt, COMNET - 1995, Washington, D.C., Jan. 26, 1995. The courts, too, have explicitly recognized that the government has a significant interest in preventing private interests from unfairly exploiting their control over the "critical bottleneck" of communications networks. See supra note 14.

[27] Some LECs have attempted to dismiss this issue based on their view that the set-top box clearly constitutes customer premises equipment ("CPE"). Reply Comments of Southwestern Bell Corporation, CC Docket No. 87-266 (filed Jan. 17, 1995), at 5-7 (hereinafter "Southwestern Bell Reply Comments"); Reply Comments of U S WEST Communications, Inc., CC Docket No. 87-266 (filed Jan. 17, 1995), at 2-3. Yet the potential bottleneck remains, and may (indeed must) still be appropriately addressed by the Commission, even if the set-top box is assumed to be CPE. As Viacom previously suggested, the Commission could nonetheless apply nondiscrimination and disclosure safeguards to the extent necessary to ensure that the set-top box is technologically open to all programmers, packagers, and other network users. Viacom Comments at 5; Viacom Reply at 7.

Southwestern Bell's further objections to the open access point appear to emanate mostly from the LEC's

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As it has indicated in its previous VDT comments, Viacom recognizes that there may be alternative regulatory paths to safeguarding open access to subscribers, free of any set-top box bottleneck. Viacom's interest remains only in ensuring that the Commission's VDT policy delivers on its promise of providing "a means by which end-user subscribers can access any and all of the video programming offered."[28] Through whatever approach it deems appropriate, the FCC should thus (1) require that the full technical specifications or parameters for set-top boxes (or functionally equivalent elements) necessary for programmers and packagers to reach subscribers in a nondiscriminatory manner be made publicly available within a meaningful time frame, and (2) take any

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[27](...continued) fundamental disagreement with the Title II framework established for video dialtone. See Southwestern Bell Reply Comments at 1-2; Southwestern Bell Corporation's Initial Comments on Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266, at 1-2, 5-7 (filed Dec. 16, 1995); see also Memorandum Opinion & Order on Recon., 10 FCC Rcd. at 257-58 (discussing Southwestern Bell request that FCC "eliminate the requirement that LECs offer capacity to serve multiple video programmers and expand that capacity as demand increases" and "that it should be permitted to allocate most of its analog channel capacity to a single video programmer"). Southwestern Bell's desire to reject VDT common carrier obligations is clearly contrary to the goals pursued by the Commission, and supported by Viacom, for the terms of LEC entry into the provision of video programming. As for the suggestion that an open standards approach would somehow amount to confiscation of technology, Viacom has no objection to reasonable license fees for the use of open access technologies that rely on proprietary patents.

[28] See supra note 25.

further regulatory steps necessary to require that neither technological nor economic obstacles are created around the set-top box (or its functional equivalent).

The Commission has already taken preliminary steps consistent with this course. In its recent VDT authorization subjecting Bell Atlantic to the Computer III network disclosure rules,[29] the FCC required the LEC to provide all video programmers and packagers with nondiscriminatory access to technical information concerning the basic video dialtone platform and related equipment. Viacom supports the adoption of such safeguards generally in the VDT context, but is concerned that the still-evolving nature of VDT makes it difficult to determine, at this time, whether any specific modifications need to be made to those rules.[30] In particular, it is unclear how broadly the VDT network will be defined for purposes of these rules. Viacom believes, however, that the rules ultimately adopted should further the goal of creating a transparent interface between the ultimate subscriber and the VDT network, thus allowing the subscriber to obtain nondiscriminatory access to all services offered

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[29] Fourth Further Notice at ¶ 33 (citing Bell Atlantic Market Trial Order).

[30] In addition to applying disclosure rules to the VDT network and related equipment as initially offered, Viacom submits that, at a minimum, these rules must also ensure that all programmers, packagers, and other users of the VDT platform have sufficient time to adapt to any relevant technological changes in the VDT system.